

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ROANOKE DIVISION**

<b>LEVI SPRINGER,</b>	)	
Plaintiff	)	Civil Action No.: 7:12cv00158
	)	
v.	)	
	)	<b><u>REPORT AND RECOMMENDATION</u></b>
<b>C/O BROWN #1, et al.,</b>	)	By: PAMELA MEADE SARGENT
Defendants.	)	United States Magistrate Judge

The pro se plaintiff, Levi Springer, is an inmate at Red Onion State Prison, (“ROSP”). This case is before the court on the defendants Karen Bullion, Karen Nelson, Autumn Whitt and Vicki Phipps’s, (“Healthcare Defendants”), motion for summary judgment for failure to exhaust administrative remedies, (Docket Item No. 33). None of the parties have requested a hearing. The motion is before the undersigned magistrate judge by referral pursuant to 28 U.S.C. § 636(b)(1)(B). The undersigned now submits the following report and recommended disposition.

*I. Facts*

Springer brings this civil rights action against several correctional officers, prison workers and ROSP Warden Randal Mathena. Springer seeks damages and unspecified injunctive relief under 42 U.S.C. § 1983 for interference with his ability to exhaust his administrative remedies and cruel and unusual punishment.<sup>1</sup> Springer’s claims all arise from injuries he claims he suffered on December 6, 2011, when correctional officers slammed the security box on his cell on his arms.

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<sup>1</sup> Springer’s claims are contained in his Complaint, (Docket Item No. 1), and in a motion to amend, which the court has denied. (Docket Item Nos. 28, 39.) Therefore, I will address only the allegations contained in the Complaint.

In particular, Springer alleges that Phipps violated his Eighth Amendment right to be free from cruel and unusual punishment by denying him medical treatment at a hospital or the institution's infirmary. Springer alleges that he requested that he be placed in the infirmary on December 7 and again on December 11, 2011, so his bandages could be changed. Springer alleges that Nurse Whitt violated his Eighth Amendment right to be free from cruel and unusual punishment in that she refused to change the bandages on his wounds on December 7, 2011. Springer claims that Bullion and Nelson, Qualified Mental Health Professionals, violated his right to be free from cruel and unusual punishment by attempting to convince him that the wounds suffered on December 6, 2011, were self-inflicted in an effort to cover up the fact that he was injured by correctional officers.

Furthermore, Springer alleges that on October 3, 2011, Warden Tracy Ray restricted him to filing only one complaint per week through December 31, 2011. (Complaint at 11.) Springer has filed a Receipt indicating that he filed a complaint which was received by R. Blair on December 7, 2011. (Complaint at 9A.) Springer states that this receipt is for an emergency grievance requesting that his bandages be changed. Springer also has provided a copy of an emergency grievance he filed on December 12, 2011, requesting that his bandages be changed. (Complaint at 10A.)

In support of their motion for summary judgment, the Healthcare Defendants have filed the affidavit of Rena Mullins, an Institutional Grievance Coordinator at ROSP. (Docket Item No. 34, Exhibit A.) According to Mullins, the Virginia Department of Corrections has established a grievance procedure which is available to all of its inmates to resolve inmate complaints. Inmates are informed of the procedure when they come into a VDOC facility. This procedure is found in

Operating Procedure, (“OP”), 866.1, entitled “Inmate Grievance Procedure.” Under this procedure, grievances are to be submitted within 30 calendar days from the date of the incident. Prior to submitting a regular grievance, the inmate must demonstrate that he has made a good faith effort to informally resolve his complaint. This may be accomplished by submitting an informal complaint form to the appropriate department head.

Under the procedure, prison staff should respond to an inmate’s informal complaint within 15 calendar days. When filing a formal grievance, an inmate must attach documentation showing that he first attempted to resolve the issue informally. Only one issue may be addressed per grievance form.

There are three levels of review available for regular grievances. Level I reviews are conducted by the warden or superintendent of the facility. A response at Level I must be made within 30 days. Level II responses are provided by the Regional Director, Health Services Director or Chief of Operations for Classification and Records and must be made within 20 days. For most issues, Level II is the final level of review. For issues appealable to Level III, the Deputy Director or Director of the VDOC conducts the review. A response to a Level III appeal must be made in 20 days. The procedure states that expiration of the time limit without issuance of a response at any stage of the process automatically qualifies the grievance for appeal to the next level of review.

Under the procedure, any grievance that does not meet the filing requirements of OP 866.1 is returned to the inmate noting the reason for the return on the intake section of the grievance form. An intake decision may be reviewed by sending the grievance to the Regional Ombudsman for a review.

According to Mullins, Springer filed a regular grievance on January 19, 2012, alleging that Warden Mathena instructed Vicki Phipps to instruct the doctor to evaluate Springer's arms, and, if stitches were needed, not to send Springer to the hospital or for medical observation. (Docket Item No. 34, Exhibit A, Attachment, Regular Grievance Form 1.) On January 25, 2012, this grievance was returned to Springer for the reason that the 30-day filing period had expired. (Docket Item No. 34, Exhibit A, Attachment, Regular Grievance Form 1.) Springer requested review of this decision, which was upheld on February 1, 2012, by the regional ombudsman. (Docket Item No. 34, Exhibit A, Attachment, Regular Grievance Form 1.)

On February 3, 2012, Springer filed a regular grievance alleging that Qualified Mental Health Professional, ("QMHP"), Nelson told him that two correctional officers told her that he cut himself, but would not tell Springer their names. (Docket Item No. 34, Exhibit A, Attachment, Regular Grievance Form 3.) On February 7, 2012, the grievance was returned to Springer for the reason that the 30-day filing period had expired. (Docket Item No. 34, Exhibit A, Attachment, Regular Grievance Form 3.) Springer requested review of this decision, which was upheld on February 16, 2012, by the regional ombudsman. (Docket Item No. 34, Exhibit A, Attachment, Regular Grievance Form 3.)

On February 3, 2012, Springer submitted a regular grievance alleging that QMHP Bullion stated that she was told that Springer tried to kill himself or cut himself. (Docket Item No. 34, Exhibit A, Attachment, Regular Grievance Form 2.) Springer stated that when he questioned her about who told her this, he alleges that she "lied" and said she could not recall who it was. (Docket Item No. 34, Exhibit A, Attachment, Regular Grievance Form 2.) On February 7, 2012, this grievance

was returned to Springer for the reason that the 30-day filing period had expired. (Docket Item No. 34, Exhibit A, Attachment, Regular Grievance Form 2.) Springer requested review of the decision, which was upheld on February 16, 2012, by the regional ombudsman. (Docket Item No. 34, Exhibit A, Attachment, Regular Grievance Form 2.)

On February 5, 2012, Springer submitted a regular grievance alleging that Nurse Autumn Whitt refused to provide nonstick dressing to his gash on several occasions. (Docket Item No. 34, Exhibit A, Attachment, Regular Grievance Form 4.) On February 7, 2012, his grievance was returned to him for the reason that the 30-day filing period had expired. (Docket Item No. 34, Exhibit A, Attachment, Regular Grievance Form 4.) Springer requested a review of this decision, which was upheld on February 16, 2012, by the regional ombudsman. (Docket Item No. 34, Exhibit A, Attachment, Regular Grievance Form 4.)

Mullins stated that the regular grievances filed by Springer were filed after the 30-day filing periods had expired. Springer filed no other regular grievances regarding the issues alleged against the Healthcare Defendants in this case. (Docket Item No. 34, Exhibit A.)

## *II. Analysis*

The Healthcare Defendants have moved for entry of summary judgment in their favor based on Springer failing to exhaust his administrative remedies. With regard to a motion for summary judgment, the standard for review is well-settled. The court should grant summary judgment only when the pleadings, responses to discovery and the record reveal that “there is no genuine issue as to any material

fact and the movant is entitled to a judgment as a matter of law.” FED. R. CIV. P. 56(a); *see, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). A genuine issue of fact exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248.

In considering a motion for summary judgment, the court must view the facts and the reasonable inferences to be drawn from the facts in the light most favorable to the party opposing the motion. *See Anderson*, 477 U.S. at 255; *Matsushita*, 475 U.S. at 587. In order to be successful on a motion for summary judgment, a moving party "must show that there is an absence of evidence to support the non-moving party's case" or that "the evidence is so one-sided that one party must prevail as a matter of law." *Lexington-South Elkhorn Water Dist. v. City of Wilmore, Ky.*, 93 F.3d 230, 233 (6th Cir. 1996).

The Healthcare Defendants argue that summary judgment should be entered on Springer’s claims against them because Springer failed to exhaust his administrative remedies. Through the affidavit of Mullins, the defendants have produced evidence that Springer did not file a Regular Grievance regarding these issues. Springer, on the other hand, has provided a receipt for one emergency grievance within the required 30-day period received by R. Blair on December 7, 2011, for which Springer states that he was requesting that his bandages be changed. Springer also has provided an emergency grievance dated December 12, 2011, again requesting that his bandages be changed. This grievance was responded to by Nurse S. Scott on December 12, 2011, indicating that his dressing already had been changed for that day. Springer also has stated that, from October

3 to December 31, 2011, the warden of ROSP had limited him to filing one Regular Grievance form per week.

The Prison Litigation Reform Act of 1996, (“PLRA”), requires a prisoner to exhaust administrative remedies. “No action shall be brought with respect to prison conditions under section 1983 of this title ... by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C.A. § 1997e(a) (West 2012). The exhaustion requirement is mandatory and applies to all inmate suits about prison life. *See Porter v. Nussle*, 534 U.S. 516, 524 (2002). “Proper exhaustion demands compliance with an agency’s deadlines and other critical procedural rules....” *Woodford v. Ngo*, 548 U.S. 81, 90 (2006).

Administrative remedies are “available” only if they are “accessible,” “within one’s reach,” or “at one’s disposal.” *Johnson v. True*, 125 F. Supp. 2d 186, 189 (W.D. Va. 2000) (quoting *Langford v. Couch*, 50 F. Supp. 2d 544, 547 (E.D. Va. 1999)). “...[A]n administrative remedy is not considered to have been available if a prisoner, through no fault of his own, was prevented from availing himself of it.” *Moore v. Bennette*, 517 F.3d 717, 725 (4<sup>th</sup> Cir. 2008). “[W]hen prison officials prevent inmates from using the administrative process..., the process that exists on paper becomes unavailable in reality.” *Kaba v. Stepp*, 458 F.3d 678, 684 (7<sup>th</sup> Cir. 2006). Furthermore, a prisoner lacks an available administrative remedy for exhaustion purposes if the prisoner was unable to file a grievance because prison officials refused to provide him with the necessary grievance form. *See Mitchell v. Horn*, 318 F.3d 523, 529 (3<sup>rd</sup> Cir. 2003); *see also Miller v. Norris*, 247 F.3d 736, 740 (8<sup>th</sup> Cir. 2001) (“a remedy that prison officials prevent a prisoner from ‘utiliz[ing]’ is not an ‘available’ remedy under §

1997e(a)...”). Inasmuch as Springer’s evidence raises a genuine issue of material fact as to whether the grievance procedure was available to him regarding his complaints, the entry of summary judgment in the Healthcare Defendants’ favor on this issue is inappropriate.

### **PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations:

1. The evidence presents a genuine issue of material fact as to whether the grievance procedure was available to Springer to address his complaints against the Healthcare Defendants; and
2. The Healthcare Defendants have failed to demonstrate that summary judgment in their favor is appropriate based on Springer’s failure to exhaust his administrative remedies.

### **RECOMMENDED DISPOSITION**

Based on the above-stated reasons, I recommend that the court deny the Healthcare Defendants’ motion for summary judgment.

### **Notice to Parties**

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636(b)(1)(C):



Within fourteen days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed finding or recommendation to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence to recommit the matter to the magistrate judge with instructions.

Failure to file written objection to these proposed findings and recommendations within 14 days could waive appellate review. At the conclusion of the 14-day period, the Clerk is directed to transmit the record in this matter to the Honorable Samuel G. Wilson, United States District Judge.

The Clerk is directed to send copies of this Report and Recommendation to all counsel of record and unrepresented parties.

DATED: This 2<sup>nd</sup> day of November, 2012.

/s/ *Pamela Meade Sargent*  
UNITED STATES MAGISTRATE JUDGE